AUG 1 1 2003

No. 02-1711

In the Supreme Court of the United States

CINCINNATI SMSA LIMITED PARTNERSHIP,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONER

NEAL S. BERINHOUT
Cingular Wireless, LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-5571

SEAMUS C. DUFFY
Drinker, Biddle & Reath LLP
One Logan Square
Philadelphia, PA 19103
(215) 988-2700

KENNETH S. GELLER
Counsel of Record
EVAN M. TAGER
JOHN J. SULLIVAN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
Cincinnati SMSA Limited Partnership

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REPLY BRIEF FOR PETITIONER

Respondent PUCO's principal argument against review is the assertion that "the case is moot" because CLP settled the separate damages action brought by Cellnet following the PUCO's decision. PUCO Opp. 1. But this case is not moot and was not affected by the settlement of the damages action, which was an independent proceeding to which the PUCO was never a party. CLP seeks review of the operative (and only relevant) judgment on the questions presented: the Ohio Supreme Court's decision that Section 332(c)(3)(A) does not preempt the claims that CLP engaged in rate discrimination and failed to separate its wholesale and retail business operations, as required by Ohio law.

That judgment has exposed CLP to enormous potential liability, as we have explained (Pet. 28-30) and the PUCO does not seriously dispute. The fact that the PUCO has decided that it will not prospectively enforce the Ohio statutory prohibition on rate discrimination or the separation requirement for wholesale and retail CMRS operations does not lessen CLP's exposure to claims based on the PUCO's findings that CLP violated Ohio law for an extended period of time by failing to separate its wholesale and retail operations and that, as a result, CLP's hypothetical "internal wholesale rate" was zero for CMRS. The prospect of treble damages liability based on those findings, which have been affirmed by the Ohio Supreme Court, is both a substantial threat to CLP and a significant inducement to CMRS resellers, like Cellnet. That is the only reason Cellnet would expend the resources to file a brief in opposition to CLP's certiorari petition in a case that Cellnet tries to argue is moot and purely of academic interest and in which it claims to have no future financial interest (Cellnet Opp. 14-16).

The Ohio Supreme Court's decision on the preemption questions in this case — which the PUCO makes only a token effort to defend — not only burdens CLP but frustrates the

congressional goal of uniform national regulation of the "entry of" and the "rates charged by" CMRS providers, which is vital to the Nation's telecommunications policy, as explained in the *amicus* brief of the Cellular Telecommunications & Internet Association. See CTIA *Amicus* Br. 2-7. Moreover, the decision undermines the regulatory authority of the FCC, which should be heard on these issues before the Ohio Supreme Court's decision is allowed to become final. Review by this Court in these circumstances is plainly warranted.

I. THIS CASE IS NOT MOOT AND PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE IMPORTANT FEDERAL ISSUES DECIDED BY THE OHIO SUPREME COURT

A. CLP's Settlement With Cellnet Does Not Render The Case Moot.

The damages action by Cellnet was a direct and inevitable outgrowth of the PUCO's decision (Pet. 15, 29), and the potential precursor of similar actions by other CMRS resellers against CLP and other CMRS wholesalers, but that action was independent of this case and its settlement could not moot this case. Whether or not Cellnet ever filed a separate damages action, CLP was adversely affected by the PUCO's decision here, which was a declaratory ruling on the state and federal issues presented. As with any declaratory judgment of this nature, CLP faces the threat of future liability in light of the Ohio Supreme Court's affirmance of that decision. And this Court has jurisdiction to review the federal issues decided in the declaratory proceeding affecting CLP's current rights and liabilities. See *Public Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U.S. 237, 245-247 (1952).

After the Ohio Supreme Court held that Section 332(c)(3)(A) does not preempt the state-law claims adjudicated by the PUCO, the trial judge presiding over Cellnet's

damages action had no authority to reconsider that holding. The trial court also had to accept the PUCO's factual finding, affirmed by the Ohio Supreme Court, that CLP's "internal wholesale rate" was zero, which leads to the absurd conclusion that CLP had "overcharged" Cellnet by failing to provide its services for free. Faced with treble damages liability calculated on this basis, CLP was forced to settle Cellnet's claim.

Contrary to the PUCO's suggestion (Opp. 12-16), the Ohio Supreme Court's decision has continuing practical significance for CLP after the settlement of the Cellnet damages case. The PUCO does not dispute that there is no statute of limitations on claims of rate discrimination and failure to maintain separate wholesale and retail CMRS operations. As we have demonstrated (Pet. 29), any reseller that paid (or was asked to pay) any amount at all for wireless services from CLP could present a claim of discrimination based on the PUCO's finding that CLP's "internal wholesale rate" was zero.[1]

And any reseller that filed a discrimination complaint with the PUCO and received a favorable determination could then seek to file an action for treble damages under Ohio Rev. Code § 4905.61.[2] The same limitations that constrained the trial court and CLP in the Cellnet damages case would also constrain the trial court and CLP in future damages actions.

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[1] CLP does not concede that it would have no defenses against litigation of these types of claims, including due process, equitable, and other arguments. Nonetheless, the threat of such litigation is real and damaging to CLP.

[2] The PUCO's assertion (Opp. 17) that the "odds are slim" that future cases will be filed against CLP because none was filed in "the six years the *Cellnet* case was pending before the PUCO" is disingenuous. The prospects for such cases became real only after the Ohio Supreme Court's recent decision affirming the PUCO's federal preemption ruling and its finding that CLP's "internal wholesale rate" was zero.

All of these harms stem from the PUCO's declaratory ruling on state-law claims that the Ohio Supreme Court erroneously held were not preempted by federal law. The only effective recourse for CLP to reverse the underlying federal preemption holding was to petition for review by this Court of the Ohio Supreme Court's decision in this case — to which the PUCO was a party and in which the preemption issues were fully briefed, argued, and decided.

The case has even broader significance for any CMRS provider in Ohio that failed to separate completely its wholesale and retail operations — and the PUCO does not dispute that there are many in addition to CLP. Each of these CMRS providers will be subject to the same treble damages exposure under Ohio law as CLP. The potential effect of this liability on CMRS providers would be devastating.

B. The PUCO's Prospective Suspension Of The State-Law Rules At Issue Does Not Lessen The Effect Of The Ohio Supreme Court's Decision On CLP's Potential Liability.

The PUCO also asserts (Opp. 17) that it "has ended enforcement of the[] regulations" at issue here "against CMRS providers in Ohio."[3] But that suspension is prospective only (PUCO Opp. 16), and does not limit the exposure to liability that the Ohio Supreme Court's preemption ruling has created

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[3] The PUCO's suspension was based on its current assessment of the "Ohio CMRS markets" and not on any permanent or immutable concerns about the efficacy or legality of state-law rate discrimination claims against CMRS providers or the separation requirement for CMRS wholesalers. *In the Matter of the Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC LEXIS 745, at *41 (PUCO Dec. 16, 1999). The PUCO's assessment of the markets could change and the requirements at issues here could be reimposed at any time.

for CLP. Because Ohio has not "completely and irrevocably eradicated the effects" of this preemption decision, the case is not moot, *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), and review by this Court is necessary and appropriate in light of the importance of the preemption questions presented.

II. THE OHIO SUPREME COURT'S DECISION UNDERMINES FEDERAL PREEMPTION OF STATE RATE REGULATION

The PUCO has little to say about the merits of the Ohio Supreme Court's preemption decision and the conflict between that court's analysis and decisions of this Court and other federal and state courts on federal preemption of state rate regulation.

A. Rate Discrimination Claims Are A Form Of Preempted Rate Regulation.

Section 332(c)(3)(A) implements a congressional policy of allowing competitive markets to set CMRS rates without state interference: "no State * * * shall have any authority to regulate * * * the rates charged by any" CMRS provider. See Pet. 3-7 In adopting this provision, Congress expressly exempted CMRS providers from the tariff filing requirements of the Communications Act. See 47 U.S.C. § 332(c)(1)(A). Thus, Congress substituted one form of rate-setting (market competition) for another (filed tariffs), and both forms of rate-setting preempt state law, including state-law rate discrimination claims (see Pet. 17-26).

As we have demonstrated (Pet. 18-21), this Court in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil*, 204 U.S. 426 (1907), and numerous subsequent cases, see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 307-308 (1988); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578-585 (1981), has consistently held that state-law rate discrimination claims are

a form of rate regulation. Under *Abilene Cotton*, an "unreasonable rate" claim is preempted where it conflicts with federal regulation of rates. *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976).

The PUCO agrees that "in *Abilene Cotton*, the Court held a state law unreasonable rate discrimination claim to be preempted by federal law," but maintains that the rule of *Abilene Cotton* is limited to cases involving preemption "based on the existence of filed tariffs." PUCO Opp. 19. The method of federal regulation in *Abilene Cotton* (*i.e.*, filed tariffs reviewed by the ICC), however, was irrelevant to the Court's holding. The dispositive fact was that state-law rate discrimination claims are a form of rate regulation and inconsistent with exclusive federal control of how rates are set. See *Hall*, 453 U.S. at 585 (state-law authority preempted where Congress "has granted exclusive authority over rate regulation to the Commission").

In *Abilene Cotton*, the exclusive federal control over rates was vested in the ICC through filed tariffs. For CMRS, Congress has exercised exclusive federal control over rates by mandating that they be set by market forces and excluding "*any* authority" for the states to regulate rates. In either case, state-law rate discrimination claims are a form of rate regulation inconsistent with the exclusive federal control exercised by Congress.

In conflict with the *Abilene Cotton* line of cases, the Ohio Supreme Court erred in holding that the PUCO's adjudication of rate discrimination claims is not preempted by Section 332. Here, as in *Abilene Cotton*, the State seeks to impose its own determination of the "reasonableness" of a CMRS rate, despite the fact that Congress has removed "*any* authority" for the State to "regulate * * * rates" under Section 332(c)(3)(A).

The PUCO is similarly unable to distinguish the other federal and state cases cited in the petition (at 20-23) that apply a broad definition of "rate regulation" in deciding federal preemption of state-law claims. For example, the PUCO asserts that *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3d Cir. 1987), and *Alliance Shippers, Inc.* v. *Southern Pacific Transportation Co.*, 858 F.2d 567 (9th Cir. 1988), are distinguishable because the Staggers Rail Act of 1980 has "legislative history" stating that "'[n]o state law or federal or state common law remedies are available.'" PUCO Opp. 20 (quoting *G&T Terminal*, 830 F.2d at 1234). The PUCO finds no similarly "broad" statement of preemption of state law with respect to CMRS rates. Yet Section 332(c)(3)(A) (emphasis added) provides that "*no State* or local government shall have *any authority* to regulate the entry of or *the rates charged*" for CMRS. It is difficult to imagine broader or more emphatic statutory language preempting state rate regulation (as opposed to the mere "legislative history" of the Staggers Rail Act of 1980 cited by the PUCO).

B. Ohio's Separation And Record-Keeping Requirements Regulate Market Entry.

The PUCO offers even less in defense of the separation and record-keeping requirements enforced against CLP in this case. As we have demonstrated (Pet. 26-27), the PUCO itself previously concluded that these requirements regulated market "entry," finding (in its decision suspending the requirements prospectively) that CMRS providers would "be restricted from entering the Ohio market as a result of [the] mandated structural organization" of separate wholesale and retail business operations. *Structural Order*, *supra*, at *4; see Pet. 9 n. 3.

In the face of this statement, the PUCO now baldly asserts without any support or analysis (Opp. 22 n.7) that its "passing comment" did "not transform" the "requirement that CMRS

providers maintain separate wholesale and retail operations" "into a market entry regulation." But, as the cases cited in the petition (at. 27-28) demonstrated, the imposition of requirements that must be satisfied before a CMRS provider may legally operate in a state is "regulat[ing] the entry" of CMRS providers.

In addition, the PUCO's requirement of separate operations and accounting for CMRS wholesale and retail services conflicts directly with two FCC decisions rejecting that very requirement. See Pet. 27-28 (citing *Resale NPRM* at ¶¶ 42-55; *Resale Order* at ¶ 12). The PUCO argues that these FCC decisions show no purpose, policy, or intent on the part of the federal government to preempt state rules on these issues because one of the cited FCC orders refers "to a then-existing California PUC separation requirement." Opp. 23 n.8 (citing *Cellular Resale NPRM and Order*, 6 F.C.C.R. 1719 (1991)). But the FCC order referred to by the PUCO does not approve of the California requirement, and the FCC order predates (1991) the preemption provision in Section 332 proscribing the regulation of market entry, which was enacted in 1993.

Finally, Cellnet asserts that CLP "lacks standing" to challenge any regulation of market entry by Ohio because those regulations did not prevent CLP from entering the market. Cellnet Opp. 18 ("Petitioner cannot possible claim standing to argue that Ohio's rules regulated market entry because Petitioner was the very first market entrant"). Section 332, however, does not prohibit only successful market entry barriers. It prohibits a state from "regulat[ing] the entry of" CMRS providers. And Ohio surely regulated market entry when it required CMRS providers to separate their wholesale and retail operations before operating legally in the State.

III. THE FEDERAL PREEMPTION ISSUES IN THIS CASE ARE PROFOUNDLY IMPORTANT TO THE NATIONAL TELECOMMUNICATIONS INDUSTRY AND REQUIRE REVIEW BY THIS COURT

As described in the petition (at 1-3, 6-7, 28-30), and in the CTIA *amicus* brief, the preemption issues presented in this case are of profound importance to the national telecommunications industry. The Ohio Supreme Court's decision on these issues conflicts with the congressional goal of a uniform national regulatory regime for CMRS rates, with a focus on competition and investment. The decision will encourage other states, which have already "begun to assert their authority over wireless rates and entry in the guise of consumer protection," to expand that authority at the expense of national uniformity. CTIA *Amicus* Br. 8, 12.

In particular, the FCC's jurisdiction will be compromised if Ohio and other states have authority to decide rate discrimination claims and to impose structural requirements rejected by the FCC as a condition to market entry. For this reason, we agree with the PUCO that the FCC should be heard on the preemption questions presented in this case, PUCO Opp. 2 (the PUCO acknowledges that the FCC has "yet to consider" the issues), although we disagree on the timing. The FCC should be heard (through an invitation to the Solicitor General) before the Ohio Supreme Court's decision is allowed to become final.

Otherwise, if allowed to stand, the Ohio Supreme Court's preemption analysis will undermine the congressional scheme of competitively set CMRS rates overseen by the FCC. The effect of this regulatory turmoil on CMRS providers would weaken the Nation's telecommunications infrastructure, which is a bedrock of the national economy. As CTIA concludes (Br. 7), the Ohio Supreme Court's decision has "the potential to force wireless carriers to adhere to fifty plus different sets of

rules instead of allowing them to pass on to consumers the savings gained from the exploitation of nationwide business models."

In conflict with decisions of this Court and lower federal and state courts, the Ohio Supreme Court has turned federal preemption law upside down, authorizing state regulation — backed by the threat of treble damages — in a field that Congress has reserved to the federal government. Review by this Court is necessary to effectuate Congress's intent in devising a regulatory program for CMRS.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NEAL S. BERINHOUT
Cingular Wireless, LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-5571

SEAMUS C. DUFFY
Drinker, Biddle & Reath LLP
One Logan Square
Philadelphia, PA 19103
(215) 988-2700

KENNETH S. GELLER
Counsel of Record
EVAN M. TAGER
JOHN J. SULLIVAN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
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